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IN THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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OF THE STATE OF TEXAS

Ex parte Nathan Sanders, Appellant

Appeal from Lubbock County

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STATE'S BRIEF ON THE MERITS

* * * * *

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No. PD-0469-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Ex parte Nathan Sanders, Appellant

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant asks this Court to reconsider a threshold issue he never addressed in the trial court that prevents review of a substantive argument he did not adequately present to the trial court. This Court should politely decline.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

ISSUE PRESENTED

Appellant wants this Court to reverse the core holding of *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), recently affirmed, that harassment like that covered by Texas Penal Code 42.07 is non-communicative conduct that does not implicate the First Amendment so that he may attempt to avoid trial by standing on the rights of others.

SUMMARY OF THE ARGUMENT

Scott has prevented a wave of overbreadth litigation by defendants who cannot claim their First Amendment rights are violated by prosecution for intentional harassment. Appellant is in no position to complain about *Scott*, having failed to raise his argument about then-existing, allegedly controlling case law in his pretrial writ. Moreover, the ability to raise an overbreadth argument matters not at all in this case because appellant also failed to make an adequate overbreadth challenge in his writ. If the Court reaches the merits, it should again affirm *Scott*'s wisdom.

ARGUMENT

The Seventh Court decided this case based on adherence to *Scott*, and appellant asked this Court to review both the decision and its basis. But that does not mean doing so is proper, necessary, or even desirable.

I. The real question presented is what *Scott* means to Texas.

As this Court decides what to do with this case, it should consider exactly what is being asked of it. As explained below, *Scott* is a dam holding back the worst kind of facial challenges. Overruling it will have undesirable consequences.

A. Facial challenges are generally disfavored.

"[F]acial challenges are best when infrequent."[1] The Supreme Court disfavors facial challenges for multiple reasons. First, they raise the risk of premature

[1] *Sabri v. United States*, 541 U.S. 600, 608 (2004).

interpretation of statutes on the basis of barebones records or even speculation.[2] Second, they "run contrary to the fundamental principle of judicial restraint" that courts should neither address questions that are not ripe nor craft remedies broader than required.[3] "Finally, facial challenges threaten to short circuit the democratic process," thereby "frustrat[ing] the intent of the elected representatives of the people[.]"[4] Fortunately, these problems are usually avoided because the challenger must establish that no set of circumstances exists under which the act would be valid.[5]

B. Overbreadth challenges are worse.

But that is not the case with overbreadth "facial" challenges. An overbreadth challenge can succeed if the defendant shows that a substantial amount of protected speech is improperly restricted relative to the statute's plainly legitimate sweep.[6] It's what a defendant raises when he cannot claim a statute is unconstitutional as applied to him.[7] As a result, the analysis is based on speculative harm to people not involved

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[2] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

[3] *Id*. *See also Sabri*, 541 U.S. at 608-09 ("Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.")

[4] *Washington State Grange*, 552 U.S. at 451 (citations and internal quotations omitted).

[5] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[6] *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (citation omitted).

[7] *Id*. at 864-65 ("[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment.").

in the litigation.[8] In other words, overbreadth calls for abandoning basic requirements of standing.[9] Because, from a jurisprudential standpoint, overbreadth is even less favored than normal facial challenges, this "strong medicine" is "to be employed with hesitation and only as a last resort."[10]

C. *Scott* protects legislative enactments (and courts) from overbreadth challenges.

The Supreme Court has limited the damage the overbreadth doctrine can do by limiting its application to the First Amendment context.[11] In *Scott*, this Court held that a similar subsection of this statute, (a)(4), does not apply to "communicative conduct that is protected by the First Amendment" because the actor's conduct "will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words."[12] *Scott* is routinely used by courts of appeals, as in this case, to preclude overbreadth review of the harassment statute.[13]

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[8] *Sabri*, 541 U.S. at 609.

[9] *Id*.; *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

[10] *Ex parte Thompson*, 442 S.W.3d 325, 349 (Tex. Crim. App. 2014) (quotation omitted).

[11] *Salerno*, 481 U.S. at 745; *McGruder v. State*, 483 S.W.3d 880, 883 (Tex. Crim. App. 2016). *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (overbreadth is a response to the "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.").

[12] *Scott*, 322 S.W.3d at 669-70. Subsection (a)(4), *inter alia*, applies the same intent and manner requirements to "repeated telephone communications." TEX. PENAL CODE § 42.07(a)(4).

[13] *See*, *e.g.*, *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *4 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *3-4 (Tex. App.—Austin June 2, 2016, pet. ref'd); *Lebo v. State*, 474 S.W.3d 402, 407-
(continued...)

D. *Scott* stops bad actors from attempting to hide behind the rights of others.

This is why *Scott* is such a problem for appellant. He acknowledges that, left unchallenged, *Scott*'s rationale applies in this case.[14] Without any protected speech at issue, the overbreadth doctrine is inapplicable and he will have to be tried before he can complain about any alleged unconstitutionality of the law as applied to him. Thus, when appellant says *Scott* "continues to be a thorn embedded in the side of this Court's First Amendment jurisprudence,"[15] what he means is that it has been an obstacle to similarly situated defendants who want to benefit from the speculative infringement on the speech rights of others.

As shown, *Scott* serves as a dam against overbreadth challenges from countless people who likely could not win an as-applied challenge because what they did was lawfully prohibited. The real question in this case is whether the Court wants to break that dam.

II. Appellant didn't raise this question and it wouldn't matter if he did.

The decision to green-light a new wave of First Amendment litigation should be made in a case where procedures were followed and it would make a difference. This case fails on both counts.

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[13](...continued)
08 (Tex. App.—San Antonio 2015, pet. ref'd).

[14] App. Br. at 19.

[15] App. Br. at 19.

A. Appellant never presented this issue or these arguments to the trial court.

In this Court, appellant challenges *Scott*'s holding as a misapplication of dictum from *Cohen v. California*, 403 U.S. 15 (1971).[16] He says that dictum has been abrogated by three subsequent Supreme Court cases.[17] He also says that *Scott*'s holding was narrowed by this Court in *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).[18]

Appellant mentioned none of this in the trial court. This would not have been futile, as all the cases he relies on were available then and binding on even this Court. If appellant is right now, he would have been right then. All he had to do was tell the trial court what he wanted, why he thought he was entitled to it, and do so clearly enough that the trial court understood it.[19] He failed to do any of that. Appellant did not even mention *Scott* or its holding even after it was raised in the State's response.[20]

Appellant, the losing party in the trial court, should not benefit from an argument he failed to make.

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[16] App. Br. at 19-21.

[17] App. Br. at 21-22 (citing *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), *United States v. Alvarez*, 567 U.S. 709 (2012), and *United States v. Stevens*, 559 U.S. 460 (2010)).

[18] App. Br. at 22-23.

[19] *See Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (setting the standard for specificity of objections).

[20] 1 CR 88-90. Appellant cited to *Reed*, *Alvarez*, and *Stevens*, 1 CR 36-37, but did not explain (as he attempts in this Court) how they changed what appears to be controlling law raised by the State.

B. Overruling *Scott* won't matter here because appellant presented no actual overbreadth argument.

As it happens, getting over the *Scott* threshold would have gained appellant nothing because he presented an overbreadth argument in name only. The defendant, as movant, bears the burden to prove the statute's overbreadth.[21] The first step in overbreadth analysis is to construe the challenged statute.[22] Then the defendant must show the legitimate sweep of the statute by applying the appropriate level of scrutiny, if applicable, so that he can show how much protected speech is restricted and how much of that restriction is unconstitutional. This ratio, "at best a prediction," "must be realistic and not based on fanciful hypotheticals."[23]

Appellant did none of that. His three-page writ argument[24] can be summed up thus:

- The statute is subject to strict scutiny because it restricts speech based on content.
- That speech is protected because it is not categorically unprotected.
- Only unprotected speech can be lawfully restricted.
- "[M]ost speech" covered by the statute is not categorically unprotected.
- A statute that prohibits a substantial amount of protected speech is void.

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[21] *Hicks*, 539 U.S. at 122; *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Johnson*, 475 S.W.3d at 865.

[22] *United States v. Williams*, 553 U.S. 285, 293 (2008).

[23] *Broadrick*, 413 U.S. at 615 (quotation omitted).

[24] 1 CR 36-38.

This is not an overbreadth analysis. If appellant's analysis identified the statute's legitimate sweep, it did so implicitly and based on the misconception that protected speech cannot be legitimately regulated. That's silly; even content-based restrictions on protected speech can be valid if they satisfy strict scrutiny. Perhaps appellant's invocation of strict scrutiny was intended to shift the burden to the State, as it would with a traditional facial challenge, but that is not how overbreadth works.[25]

The bottom line is that the trial court would have been well within its discretion to look at appellant's writ application and decide it presented no valid ground for relief even if it decided the statute implicated the First Amendment. Given this alternative basis, an answer to the question presented in this case would have no effect on the propriety of the trial court's ruling and therefore, ultimately, the propriety of the court of appeals' decision. The result would be an advisory opinion.[26]

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[25] His brief to this Court expands upon this confusion. The flow chart in his brief, App. Br. at 35 (Figure 1), apparently ignores the concept of a legitimate sweep, asking only whether the statute "restrict[s] a real and substantial amount of protected speech?" Relative to what? Also, in both his chart and in prose, appellant explains that the utilization of scrutiny analysis occurs, if at all, only after it is determined that the statute's legitimate *or* illegitimate sweep is sufficiently large. App. Br. at 34, 35 (Figure 1), 43. This is backwards. How can one know the size of either sweep (and hence their relationship to each other) without determining if the protected speech restricted by the statute satisfies the appropriate level of scrutiny?

[26] *See Garrett v. State*, 749 S.W.2d 784, 803 (Tex. Crim. App. 1986), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997) ("An advisory opinion results when a court attempts to decide an issue that does not arise from an actual controversy capable of final adjudication.").

III. But an opinion should issue.

That does not mean the case should be dismissed as improvidently granted. There is a valuable lesson for Texans on both sides of the bench.

The rules designed to prevent review of matters not properly presented to the trial court are often ignored in First Amendment cases. This is due not only to confusion about the law but often out of respect for the Legislature and the people they represent; rather than hold defendants to their burden, the State (and sometimes the court) jumps to show the statute is constitutional. In other words, the State sometimes prefers vindication to victory on technical grounds.[27] The result is cases in which the court of appeals decides issues not properly before it on grounds that were never raised in the trial court. This should give the Court pause.

If a defendant failed to convince the trial court to suppress a small baggie of marijuana, no court of appeals would entertain arguments he did not make to the trial court. This basic jurisprudential rule should apply with greater force when the relief requested is the erasure of a statute from the Penal Code. A pretrial writ, like a motion to suppress, should not be a placeholder for arguments-to-be-named-later.

Texas needs an opinion that reaffirms the gravity of constitutional challenges, cautions defendants against barebones or placeholder writs, and empowers trial courts

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[27] A similar practice plays out in *Batson* hearings, where prosecutors sometimes defend their use of peremptory strikes without prompting or inquiry from the trial court, rendering the preliminary issue of whether the defendant made his prima facie case moot. *Hernandez v. New York*, 500 U.S. 352, 359 (1991).

to quickly dispose of them without fear that a court of appeals will provide the defendant with a winning argument two or three years later.

IV. *Scott* should be affirmed.

If this Court insists on reaching an issue with no meaningful application to this case, it should reaffirm *Scott*'s holding that intentional harassment in a manner reasonably likely to harass is not communicative conduct implicating the First Amendment.

"A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."[28] "Electronic communication" means "a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system."[29] Although the examples listed in the statute have expanded over time,[30] "electronic communication" has always been inherently broad.

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[28] TEX. PENAL CODE § 42.07(a)(7).

[29] TEX. PENAL CODE § 42.07(b)(1).

[30] At the time of the offense, the term included "(A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and (B) a communication made to a pager." Acts 2001, 77th Leg., ch. 1222, § 1, eff. Sept. 1, 2001. Subsection (b)(1)(A) now says, "a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine."
(continued...)

The statute thus prohibits repeated transfers of nearly anything through electronic means that is intentionally harassing and in a manner reasonably likely to harass. This includes harassing phone calls,[31] voice messages, texts, social media posts, and e-mails. Importantly, the "manner" of harassment includes both the time, duration, and frequency of the electronic communications—the extrinsic qualities—and the intrinsic qualities of the electronic communication. So it plainly applies to repeated e-mails filled with gibberish, texts with no message, and phone calls containing indecipherable noise. The question presented in this case is whether protecting people from this sort of harassment should be a major production requiring extensive conversation about the First Amendment because words or their equivalent are sometimes used.

A. Neither the use of words nor an emotional aspect defeat common sense.

It is difficult to improve upon the wisdom of *Scott*, reaffirmed two years ago in *Wagner v. State*: a statute that prohibits intentional, repeated harassment that is reasonably likely to have the intended effect "is capable of reaching only conduct that is not entitled to constitutional protection because such conduct will, by definition, invade the substantial privacy interests of the complainant in an essentially intolerable

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[30](...continued)
TEX. PENAL CODE § 42.07(b)(1)(A).

[31] *Scott* said otherwise when it determined that subsection (a)(4), not (a)(7) was at play, 322 S.W.3d at 668, but overlap does not necessarily render one meaningless or create absurdity. *Clinton v. State*, 354 S.W.3d 795, 802 (Tex. Crim. App. 2011).

manner."[32] This is not the creation of a new category of unprotected speech, in a "'freewheeling' manner"[33] or otherwise. It is the simple recognition that words that are not intended to communicate an idea are not "speech" as contemplated by the First Amendment. It is, as this Court said in *Scott* and *Wagner*, prohibitable conduct.[34]

B. *Stevens* does not apply where there is no "speech."

Appellant's argument—his entire view of the First Amendment, in fact—relies heavily on *Stevens*. In *Stevens*, the Supreme Court discussed categories of speech it had identified as "fully outside the protection of the First Amendment," like obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[35] Such speech is categorically proscribable *because of its message*. Some, like incitement, is prohibited because the message is the promotion of an undesirable response but it is still the idea communicated that is the problem. Criminalizing conduct committed with the intent to harass is different. The State does not have to prove the intended communication of any idea because that is not what is being

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[32] *Wagner v. State*, 539 S.W.3d 298, 311 (Tex. Crim. App. 2018) (citing *Scott*, 322 S.W.3d at 670).

[33] App. Br. at 32.

[34] The State did not file a petition on this point, but the court of appeals was wrong to reject the State's argument that the statute reaches conduct rather than speech; the distinction drawn in *Scott* was between communicative and non-communicative conduct. *Scott*, 322 S.W.3d at 669-70.

[35] *Stevens*, 559 U.S. at 468-71. *But see R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992) (rejecting the idea of "categories of speech entirely invisible to the Constitution.").

prohibited; one can harass with non-verbal screaming or with "messages" the speaker does not care about, as when one spray-paints a swastika just for shock value.[36] *Stevens* may prevent the expanded exemption of speech from First Amendment protection but it does not change what makes something speech in the first place.

C. *Reed* generally supports *Scott*'s rationale.

Appellant also relies on *Reed*. As it specifically relates to *Scott*, the recurring theme of *Reed* is that a statute is a content-based restriction on speech when it focuses on the topic discussed, the idea or message expressed, the communicative content, etc.[37] If, as appellant says, "much speech is not intended to communicate ideas or thoughts,"[38] then *Reed* has no application to "much speech." And it gives no reason to treat intentionally harassing, reasonably-likely-to-harass words transmitted electronically as anything other than harassing, non-communicative conduct.

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[36] The offense of "graffiti" criminalizes putting inscriptions and slogans on the property of others, TEX. PENAL CODE § 28.08(a), yet courts waste no time worrying over whether graffiti is a "recognized historically unprotected category of speech" before prosecution commences. A victim's violated privacy should matter as much as his defaced wall, even when words are used.

[37] 135 S.Ct. at 2226 ("Content-based laws—those that target speech based on its communicative content . . . ."), 2227 ("Government regulation of speech is content based if a law applies . . . because of the topic discussed or the idea or message expressed."), 2227 ("This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."), 2227 ("distinctions drawn based on the message a speaker conveys . . . are subject to strict scrutiny."), 2227 ("[A] speech regulation is content based if the law applies . . . because of the topic discussed or the idea or message expressed."). *But see id.* at 2227 ("Laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys . . . must also satisfy strict scrutiny.") (cleaned up).

[38] App. Br. at 38.

V. Conclusion

One day, a defendant will make an argument that presents the relevant issues in a meaningful and helpful way such that a trial court can decide whether *Scott* has been overruled. Until then, this Court should refrain from deciding issues not properly presented to any lower court. It may very well be that Texas could use an opinion advising it of the continued vitality of *Scott* but that is all it would be—an advisory opinion. Rather than dismiss appellant's petition as improvidently granted, however, the Court should explain why the issue granted review was not properly presented (or even material) such that defendants might create the opportunity to have their claims reviewed on the merits.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals and affirm the trial court's denial of appellant's pretrial writ.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,526 words.

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The undersigned hereby certifies that on this 23rd day of January, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

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